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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY DAVIS,

Defendant and Appellant.

B200438

(Los Angeles County
Super. Ct. No. BA295335)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Robert J. Perry, Judge. Affirmed.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B.
Wilson and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Larry Davis was convicted by a jury of aggravated arson as a result of setting fire to his former girlfriend's house for the second time. On appeal, he contends the Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 220, as given to the jury, failed properly to instruct that the evidence must induce a subjective certainty in each of the jurors to satisfy the due process requirement of proof beyond a reasonable doubt. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Davis was charged by amended information with one count of aggravated arson (Pen. Code, § 451.5, subd. (a))¹ and one count of disobeying a domestic relations order (§ 273.6, subd. (a)). The amended information specially alleged Davis had suffered a prior serious felony conviction (for arson) within the meaning of both section 667, subdivision (a)(1), and the "Three Strikes" law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)), and had served five separate prison term for felonies (§ 667.5, subd. (b)).

In short, in 1997, Davis went to the house of his girlfriend, Shirley Ward, and threatened to harm her and her son. Hours later, there was a fire on the side of Ward's house, which was found to have been intentionally set.

In 2005, Davis was upset because Ward had allowed her daughter and grandchildren to move in with her, and he repeatedly threatened them with harm. Early Christmas morning, Davis came to Ward's house, pounded on the front door and urged Ward and her family to leave the house because "something bad is going to happen." Hours later, the front portion of the house was on fire and the family left through the back door. Davis was outside the house in violation of a restraining order, and he was arrested. Police found three lighters on Davis when he was searched. An arson expert

¹ All further statutory references are to the Penal Code.

testified the fire was intentionally set and could have been started by the lighters recovered from Davis.

The jury found Davis guilty of both counts. In a bifurcated proceeding, the trial court found true the special allegations, with the exception of three of the prior prison enhancement allegations.)~ Davis was sentenced to an aggregated state prison term of 27 years to life, consisting of a term of 10 years to life on count 1, aggravated arson, doubled under the Three Strikes law, plus a consecutive five-year term for the serious felony enhancement, plus two consecutive one-year terms for the remaining two prior prison term enhancements. Sentencing on count 2, disobeying a domestic relations order, was stayed pursuant to section 654.

DISCUSSION

Before jury deliberations commenced, without defense objection, the trial court used CALCRIM No. 220 to define “reasonable doubt” as “proof that leaves you with an abiding conviction that the charge is true.”² Davis contends the instruction did not

² As given to the jury, CALCRIM No. 220 provides, “The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find (him) not guilty.”

properly convey to jurors they must have both an objective and subjective certainty in the truth of the charged offenses to find him guilty.³

1. *Standard of Review*

When reviewing whether jury instructions correctly state the law, we apply an independent or de novo standard of review. (*People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1506.) In this regard, we consider the entire charge, not parts of an instruction or a particular instruction. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) A defendant must show a reasonable likelihood the jury misunderstood the challenged instructions. (*People v. Cain* (1995) 10 Cal.4th 1, 36-37.)

2. *CALCRIM No. 220 Properly Defines Reasonable Doubt*

Davis argues CALCRIM No. 220 does not accurately reflect the subjectivity required for the reasonable doubt standard set forth in section 1096.⁴ Davis maintains nothing in the instruction conveys to jurors “the issue is not only a cognitive assessment of the evidence, but something that is also felt subjectively in the sense outlined” by section 1096. Furthermore, Davis urges the reference to “abiding conviction” in CALCRIM No. 220 is inadequate to apprise jurors of the required subjectivity. Simply

³ The People argue Davis has forfeited this claim of instructional error by failing to object in the trial court. However, even in the absence of an objection if the purported error affects the defendant’s substantial rights it can be reviewed on appeal. (§1259; *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7.) Because Davis’s position is the challenged reasonable doubt instruction was a misstatement of law, he did not have to raise the issue at trial, and we review his claim on the merits. (*People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249.)

⁴ Section 1096 provides: “A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: ‘It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.’”

put, Davis claims CALCRIM is an incorrect statement of law or, at least, “one that is reasonably likely to be applied in an unconstitutional manner,” and is therefore fatally deficient under the Due Process Clause of the Fourteenth Amendment.

Proof beyond a reasonable doubt requires “a subjective state of near certitude of the guilt of the accused.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 315 [99 S.Ct. 2781, 61 L.Ed.2d 560,].) In *Victor v. Nebraska* (1994) 511 U.S. 1, 14-15 [114 S.Ct. 1239, 127 L.Ed.2d 583] (*Victor*), the Supreme Court stated a reasonable doubt instruction “cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government’s burden of proof.” Davis nonetheless argues the term “abiding conviction” depends on the context in which it is placed, and the *Victor* court did not validate all reasonable doubt instructions containing the term. Davis notes that “abiding conviction,” as defined in *Hopt v. Utah* (1887) 120 U.S. 430, 439 [7 S.Ct. 614, 30 L.Ed.708] advises jurors they must have “an abiding conviction of the defendant’s guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt.” Because of the simile, Davis asserts the term “abiding conviction” as defined in that case gave jurors the proper guidance and insight concerning the heavy burden that is reasonable doubt, but the term, used without explanation in CALCRIM No. 220, does not.

The same arguments were recently made in *People v. Zepeda* (2008) 167 Cal.App.4th 25 (petition for review denied on December 17, 2008), and rejected as “border[ing] on the frivolous” by the Third District Court of Appeal. (*Id.* at p. 30.) We adopt the reasoning of *Zepeda* as applicable here. “First, the trial court is not required to instruct the jury in the language of section 1096 or even reference a subjective state of certitude. [Citations.] ‘The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. [Citation.] Indeed, so long as the court instructs the jury on the necessity that the defendant’s guilt be proved beyond a reasonable doubt, [citation] the Constitution does not require that any particular form of words be used in advising the jury of the government’s burden of proof. [Citation.]

Rather, “taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.” [Citation.] [Citation.] Thus, nothing requires a trial court instructing on reasonable doubt to define any amount of subjective certitude required to make a finding of guilt.” (*Zepeda, supra* 167 Cal.App.4th at p. 30.)

“Second, defendant’s argument is mere semantics. The phrase ‘abiding conviction,’ even without being described as ‘felt,’ adequately conveys the subjective state of certitude required by the standard of proof. The modifier ‘abiding’ informs the juror his conviction of guilt must be more than a strong and convincing belief. Use of the term “abiding” tells the juror his conviction must be of a ‘lasting, permanent nature[,]’ and it informs him ‘as to how strongly and how *deeply* his conviction must be *held*.’ [Citations.]” (*Id.* at pp. 30-31, fn. omitted.)

“The term ‘abiding conviction’ in the reasonable doubt instruction ‘convey[s] the requirement that the jurors’ belief in the truth of the charge must be both long lasting and *deeply felt*.’ [Citation.] This is so whether the conviction is ‘held,’ ‘felt,’ or had. We cannot imagine a personal abiding conviction that is not deeply felt in the sense defendant uses those words. Thus, contrary to defendant’s contention, the phrase ‘abiding conviction’ needs no additional context or description to convey the type of personal conviction required to pronounce guilt.” (*Zepeda, supra*, 167 Cal.App.4th at p. 31.)

“Moreover, CALCRIM instructions go one step further in informing the jurors of the subjective nature of their convictions. CALCRIM No. 220’s phrase, ‘proof that leaves you with an abiding conviction that the charge is true,’ unmistakably conveys the conviction’s subjective nature and the very high level of certainty required. In addition, CALCRIM No. 3550, also given to the jury by the trial court, told the jurors each ‘must decide the case for yourself’ and that they should not change their minds ‘just because other jurors’ disagree with them. There is little likelihood the jury misunderstood these instructions to mean something other than the type of personal conviction defendant seeks to ensure.” (*Ibid.*)

Finally, considering the instructions as a whole, it does not appear Davis has made the requisite showing of a reasonable likelihood the jury misunderstood the CALCRIM

No. 220. The instruction “conveys to the jury the concept of reasonable doubt without being ambiguous or obscuring the concept’s scope. It defines proof beyond a reasonable doubt as proof that leaves the juror with an abiding conviction, a description that legally and linguistically means a deeply felt conviction. By referencing an ‘abiding conviction,’ the instruction ‘correctly states the government's burden of proof.’ [Citation.] The Constitution requires nothing more. The trial court committed no error by instructing the jury with CALCRIM No. 220.”⁵ (*Zepeda, supra*, 167 Cal.App.4th at pp. 31-32.)

DISPOSITION

The judgment is affirmed.

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WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.

⁵ The new CALCRIM instructions are largely based on the CALJIC instructions. Yet, there have been repeated challenges to the new material in the CALCRIM instructions. “Most of the challenges [to the CALCRIM instructions] involve isolated language that defendant reads out of context from the instruction as a whole or the other instructions given to the jury. Other challenges concern language virtually identical to that previously approved in the CALJIC instructions that were used in California for many years.” (*People v. Anderson* (2007) 152 Cal.App.4th 919, 924.) Of significance here, the California Supreme Court and Courts of Appeal have consistently rejected such challenges to the “abiding conviction” phrase in CALJIC No. 2.90. (*People v. Cook* (2006) 39 Cal.4th 566, 601; *People v. Freeman*, (1994) 8 Cal.4th 450, 501-505; *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287.) Those decisions equally apply to the language of CALCRIM No. 220. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1239.) “The definition of reasonable doubt in CALCRIM No. 220 is derived from CALJIC No. 2.90 which in turn was taken directly from the language of section 1096 which, when given, requires ‘no further instruction ... defining reasonable doubt’ (§ 1096a.)” (*People v. Campos, supra*, at p. 1239.)